No. 978.

Filed Oct. 22, 1901.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1901.

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EXCELSIOR WOODEN PIPE COMPANY,
*Appellant,*

vs.

PACIFIC BRIDGE COMPANY
AND CHARLES F. ALLEN,
*Appellees.*

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF WASHINGTON, NORTHERN DIVISION.

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Motion to Dismiss the Appeal; Notice of Said Motion; Brief of Appellees upon Said Motion.

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JAMES B. HOWE,
W. H. BOGLE AND
A. R. TITLOW,
Solicitors for Appellees.

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Filed , 1901.

IN THE

# SUPREME COURT

OF THE

## UNITED STATES.

OCTOBER TERM, 1901.

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| EXCELSIOR WOODEN PIPE COMPANY, *Appellant,* vs. PACIFIC BRIDGE COMPANY AND CHARLES P. ALLEN, *Appellees.* | No. 375. |

## MOTION TO DISMISS APPEAL.

Come now the appellees, Pacific Bridge Company and Charles P. Allen, by their solicitors, James B. Howe, W. H. Bogle and A. R. Titlow, and move the Court to dismiss the appeal herein for want of jurisdiction to hear and determine the same, because—

FIRST. The final decree of the Circuit Court from which said appeal was taken was made and entered on the 5th day of November, 1900; the then term of said Circuit Court expired on the first Monday in December, 1900—(Act of Congress, approved April 5th, 1890,)—and no

appeal was taken or asked for by said appellant, nor was any certificate of the trial court certifying the question of jurisdiction to this court asked for by appellant or given by said trial court during said term of court—the appeal herein having been asked for and the assignments of error filed on the 27th day of May, 1901.

SECOND. The question of the jurisdiction of the Circuit Court has not been certified by said Circuit Court to this court for decision, as required by the Act of March 3rd, 1891, to confer jurisdiction of the appeal on this court.

JAMES B. HOWE,
W. H. BOGLE and
A. R. TITLOW,
Solicitors for Appellees.

*In the Supreme Court of the United States.*

*October Term, 1901.*

EXCELSIOR WOODEN PIPE COMPANY, *Appellant,*

vs.

PACIFIC BRIDGE COMPANY AND CHARLES P. ALLEN, *Appellees.*

No. 375.

NOTICE.

To N. A. ACKER, ESQ., and
L. S. BACON, ESQ.,
Solicitors and counsel for Appellant:

You will please take notice that on Monday, the 25th day of November, 1901, at the opening of the court, or as soon thereafter as counsel can be heard, appellees above named will make and present to the Supreme Court of the United States the foregoing motion to dismiss the appeal in this cause, and will submit said motion to said court for its decision.

Annexed hereto is a copy of the brief to be submitted with said motion in support thereof.

JAMES B. HOWE,
W. H. BOGLE and
A. R. TITLOW,
Solicitors for Appellees.

*In the Supreme Court of the United States.*

*October Term, 1901.*

EXCELSIOR WOODEN PIPE COMPANY, *Appellant,*

vs.

PACIFIC BRIDGE COMPANY AND CHARLES P. ALLEN, *Appellees.*

No. 375.

## Brief for Appellees on Motion to Dismiss Appeal.

The decree appealed from in this case was rendered on November 5th, 1900, (Record, page 38); the first step taken by appellant toward the present appeal was taken on May 27th, 1901, by filing a petition for an appeal and an assignment of errors in said Circuit Court.

Under the Act of Congress, approved April 5th, 1890, two terms of the Circuit Court for the Northern Division of the District of Washington are held annually at Seattle, one term beginning on the first Tuesday in June, and the other on the first Tuesday in December. The June term, at which the decree appealed from was rendered, necessarily expired by operation of law before the December term began.

The appeal in this case is on the question of jurisdiction alone, no contention being made that the action involved "the construction or application of the Constitution of the United States."

The act of March 3rd, 1891, as heretofore construed by this court, in effect provides that there can be no appeal to this court on the question of jurisdiction, unless

the trial court, during the term at which the judgment, decree or order is given, certifies that the question of jurisdiction alone is involved.

*Colvin vs. City of Jacksonville, 158 U. S., 456.*
*The Bayonne, 159 U. S., 687.*
*Merritt vs. Bowdoin College, 167 U. S., 745.*
*S. C., 169 U. S., 551.*
*Chappell vs. U. S., 160 U. S., 499.*
*Davis vs. Geissler, 162 U. S., 290.*
*Huntington vs. Laidley, 176 U. S., 668.*

This court has repeatedly held, notably in *Colvin vs. City of Jacksonville*, 157 U. S., 368, *Davis vs. Geissler*, 162 U. S., 290, and *Merritt vs. Bowdoin College*, 167 U. S., 745, that, in order to maintain the appellate jurisdiction of this court under the 5th section of the act of March 3rd, 1891, there must be, in addition to the terms of the order appealed from, some further act of the trial court, either in the form of a formal certificate, or of an order authorizing or allowing the appeal and which is equivalent to a formal certificate, whereby the question of jurisdiction alone is distinctly sent by the trial court to this court for decision. The fact that this court can ascertain, from the terms of the order or decree appealed from, that the question of jurisdiction alone was involved, is not sufficient to give appellate jurisdiction under the clause in question.

This court has also held that this certificate of the trial court, whether in the form of a certificate or of an order approving and allowing an appeal, must be granted by the trial court during the term at which the order appealed from was rendered.

*Colvin vs. City of Jacksonville, 158 U. S., 456.*
*The Bayonne, 159 U. S., 687.*

When the June term, 1900, of the Circuit Court of the

Northern Division of the District of Washington expired on December 3rd, 1900, that court had no longer any power or authority to grant any certificate or to make any order granting or allowing any appeal to this court upon the question of its jurisdiction alone. This case, therefore, is controlled by *Davis vs. Geissler*, 162 U. S., 290, in which case the terms of the judgment dismissing the case were the same as are contained in the order of dismissal in the present case. The effect of this clause of the act of March 3rd, 1891, as heretofore construed by this court is to limit the right of direct appeal to this court on the question of jurisdiction, to the duration of the term at which the order appealed from was rendered; no appeal can be entertained without a certificate from the trial court presenting the jurisdictional question to this court, and no such certificate can be granted by the trial court after the expiration of the term at which the order appealed from was rendered. This has been the construction given by the Circuit Court of Appeals to the decisions of this court above referred to.

*Reed vs. Stanley, 97 Fed. 523.*

The appeal should be dismissed.

JAMES B. HOWE,
W. H. BOGLE AND
A. R. TITLOW,
Solicitors for Appellees.